# Public Prosecutor v Tan Chye Joo & Anor

HIGH COURT (PENANG) – CRIMINAL TRIAL NO 23 OF 1983
WAN ADNAN J
13 DECEMBER 1988

*Criminal Law – Dangerous drugs – Trafficking – Raw opium found concealed in biscuit tin in ceiling – Failure of prosecution to call officer who climbed ceiling to retrieve the tin of drugs – Whether prima facie case made out against accused – Whether accused's statement after arrest is admissible – Defence of non-knowledge of tin and accessibility of room – Whether presumptions under s 37(d), (da) and (g) of Dangerous Drugs Act 1952 rebutted – Dangerous Drugs Act 1952, ss 37A, 39B(1)(a)*

*Evidence – Prosecution's application to cross-examine own witness – Allowed – Object of cross-examination – Grant of permission not an adjudication by court adverse to veracity of witness – Evidence Act 1950, s 154*

The first and second accused, who were husband and wife, were charged with trafficking in 7,645 gm of raw opium, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The case for the prosecution was that PW4 led a police party to the accused's home and conducted a search. During a search of the second room on the first floor of the premises, PW4 noticed an opening in the ceiling and that the lid had been tampered with. PW4 then instructed DPC Panjinathan to climb up to the ceiling, remove the lid and see if anything was in it. Within seconds, DPC Panjinathan took out a biscuit tin and lowered it to PW4. PW4 received the tin and asked the first accused what was in it. The first accused said 'ubat cina'. PW4 removed the lid of the tin and found four slabs of raw opium in it. PW4 then placed both the accused persons under arrest.

During the trial, the defence submitted that the prosecution had failed to make out a prima facie case against the accused because (a) failure of the prosecution to call DPC Panjinathan as a witness was fatal and (b) the statement of the first accused as to 'ubat cina' was not admissible as at the time of making it, the first accused was already under arrest. The defence also contended that the accused did not know the existence of the tin containing the drug and that their room was accessible to other occupants of the house. In the course of the hearing, the court allowed the prosecution's application for permission to cross-examine a prosecution witness under s 154 of the Evidence Act 1950 on the ground that his evidence differed from his earlier statement to the police.

**Held,** convicting the first accused and acquitting the second accused:

(1) The court had examined carefully the part played by DPC Panjinathan in the recovery of the drug. The evidence showed that he had merely taken the tin from the ceiling and immediately handed it to PW4. His handling was very brief. There was no material evidence which he could have given to the court in respect of the recovery of the tin.

(2) Under s 37A of the Act, any statement voluntarily made by any person charged with any offence against the Act before a caution has been administered to him is admissible if made by him before his arrest. In the present case, although PW4 said that the first accused was not free to go as he liked during the search, that did not mean that he had been arrested. The first accused was placed under arrest by PW4 only after the discovery of the drugs. He said 'ubat cina' before the discovery of the drugs, ie before PW4 opened the tin. His statement to PW4 was therefore admissible.

(3) The object of the cross-examination under s 154 of the Evidence Act is only to test the veracity of the witness. The grant of the permission to cross-examine is not an adjudication by the court adverse to the veracity of the witness. Whether the testimony of the witness should be rejected in whole or in part depends on the result of the cross-examination.

(4) There was evidence that the first and second accused were not only the occupiers of the premises but also the occupiers of the second room on the first floor of the premises. They had the care and management of the premises. As the drugs were found concealed in a biscuit tin above the ceiling in the second room, the presumptions under s 37(d), (da) and (g) arose and a prima facie case had been made out against both the accused persons.

(5) Having considered all the evidence adduced, the court found that the first accused knew of the existence of the tin containing the drugs concealed in the ceiling of the room occupied by him. It was highly improbable that the drugs had been placed there by other people. On the balance of probabilities, the first accused had failed to cast any doubt either as to the truth of the prosecution's case or as to his guilt. As regards the second accused, there is a doubt as to her knowledge of the existence of the tin. The court therefore acquitted and discharged her.

[*Editorial Note*: The first accused has appealed to the Supreme Court vide Criminal Appeal No 113 of 1988.]

**Cases referred to**

1 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (folld)
2 *PP* v *Tan Seow Chuan* [1985] 1 MLJ 318 (refd)
3 *Krishnan* v *PP* [1987] 1 MLJ 292 (distd)
4 *PP* v *Salleh bin Saad* [1983] 2 MLJ 164 (refd)
5 *KJ Barlow* v *PP*; *BG Chambers* v *PP* [1986] 2 MLJ 104 (refd)

**Legislation referred to**

Dangerous Drugs Act ss 37(d), (da), 37A, (1)(b), 39B(1)(a)
Evidence Act 1950 s 154

*Mohd Bazain bin Idris* (Deputy Public Prosecutor) for the Public Prosecutor.
*Ghazi Ishak* for the accused persons.

*Cur Adv Vult*

**Wan Adnan J:** The charge against the two accused persons was as follows:

> That you on the 5th of July 1983 at house No 137-0, Jalan Rambutan, Ayer Itam in the district of Georgetown in the State of Penang, in furtherance of the common intention of you all, did on your own behalf traffic in dangerous drugs, to wit, 7,645 gms of raw opium, in contravention of s 39B(1)(a) of the Dangerous Drugs Act (1952) (Revised 1980) and that you have thereby committed an offence punishable under s 39B(2) of the same Act, read with s 34 of the Penal Code.

The case for the prosecution was that on 5 July 1983 PW4 M Ramalingam led a police party to premises No 137-O, Jalan Rambutan, Air Hitam, Penang. The other members of the party were ASP Yunus, Inspector

Rafie, Inspector Arumugam, DPC Fan Eng Lai, DPC Panjinathan and D/Sgt Kok Kim Hock.

PW1 entered the premises and saw the first and second accused in the hall. He identified himself to them and told them the purpose of the police visit. A search was made on the ground floor but nothing was found. The two accused persons were then taken upstairs to the first floor. In the presence of the accused persons the first room was searched. No drugs were found in that room. PW4 asked the first and second accused as to which room they occupied. They led PW4 to the second room. A search was carried out but nothing incriminating was found in the room. As PW4 was about to leave the said second room he noticed on the ceiling of the room an opening with a lid on. The lid appeared to have been tampered with. PW4 then instructed DPC Panjinathan to climb to the ceiling, to remove the lid, and to see if there was anything on the ceiling. DPC Panjinathan climbed up. He removed the lid to the side and within seconds he took out a biscuit tin and lowered it to PW4. DPC Panjinathan just put his head above the ceiling and brought down the tin. PW4 received the tin and asked the first accused what was in the tin. The first accused said, 'ubat cina.' PW4 removed the lid of the tin and found inside it four slabs of a blackish substance believed to be opium. PW4 then placed both the accused persons under arrest. The four slabs of blackish substance were analysed by the chemist PW3, who found them to contain 7,645 gm of raw opium.

At the close of the prosecution case I had to consider whether there was some evidence (not inherently incredible) which if I were to accept as accurate would establish each essential element of the alleged offence: see *Haw Tua Tau* v *PP*.[1] The learned counsel for the accused persons submitted that the prosecution had failed to make out a prima facie case against both the accused persons. Among his grounds were the following:

(a) failure of the prosecution to call DPC Panjinathan who took the drug from the ceiling was fatal;
(b) the statement of the first accused – 'ubat cina' – was not admissible as at the time of making it the first accused was already under arrest.

(A) *Failure of prosecution to call DPC Panjinathan*

It was submitted by the learned counsel that as DPC Panjinathan was the one who took the biscuit tin containing the drug from the ceiling he was a material witness for the prosecution and failure to call him as a witness was fatal to the prosecution. I had examined carefully the part played by DPC Panjinathan in the recovery of the drug. PW4 said in evidence:

> I then instructed DPC Panjinathan to climb to the ceiling to remove the lid and to see if there was anything on the ceiling. He climbed up. He removed the lid to the side and within seconds he took out a biscuit tin and lowered it down to where I was. He put his head above the ceiling and brought down the tin. I received the tin ...

During cross-examination he said:

> It is not possible to reach by hand while standing. Panjinathan used a stool to climb onto a cupboard to reach the hole. He used two stools. Panjinathan went up for hardly a minute. Panjinathan was standing on the cupboard when he lowered the tin.

The above evidence shows that Panjinathan had merely taken the tin from the ceiling and immediately handed it to PW4. His handling was very brief. There was no material evidence which he could have given to the court in respect of the recovery of the tin. Section 114(g) of the Evidence Act 1950 does not apply.

(B) *Statement of first accused – 'ubat cina' – is not admissible*

It was contended by the learned counsel that at the time when the first accused was alleged to have said 'ubat cina', he was already under arrest. He said PW4 Ramalingam had stated in evidence that the accused was not free to go as he liked while the search was on. The first accused therefore had been arrested and since no caution had been administered the statement was inadmissible. To support his proposition he referred me to the judgment in *PP* v *Tan Seow Chuan*.[2] Later at the close of the defence case he referred me to another case, namely, *Krishnan* v *PP*.[3] In reply the learned DPP contended that the words 'after the arrest' in s 37A(1)(b) means actual arrest. He referred me to the judgment in *PP* v *Salleh bin Saad*.[4] According to him, the judgment was confirmed by the Federal Court but no judgment was written. Another case referred to me was *KJ Barlow* v *PP*; *BG Chambers* v *PP*.[5]

Under s 37A of the Dangerous Drugs Act 1952 any statement voluntarily made by any person charged with any offence against the Act before a caution has been administered to him is admissible if made by him before his arrest. The question therefore is, when was the first accused arrested? The case of *Krishnan* v *PP*[3] is not relevant to this case because in that case the facts were different. In that case, the Supreme Court held that the arrest of the appellant had taken place when the investigation officer pursued the appellant into his (appellant's) house. The facts as disclosed in the evidence of the IO were as follows:

> On arrival, I saw one male Indian standing in front of the house. When he saw me, he ran into the house. I gave chase into the house and introduced myself as a police officer. I went to the house because I received information in respect of dadah. I chased him, he was behaving suspiciously ...

The Supreme Court case of *KJ Barlow* v *PP*; *BG Chambers* v *PP*[5] is more relevant to this case. In that case the

statements made by the accused persons to ASP Shahriman were admitted at the trial. They were made before the accused persons were arrested. The accused persons were placed under arrest only after the discovery of the drugs. They were earlier approached by ASP Shahriman who asked them to retrieve their bags from the checked-in counters at the airport and to follow the ASP with their luggage to the checking room where the bags were checked. In the present case, just as in the case of *Barlow*[5] and *Chambers*,[5] the first accused was placed under arrest by PW4 only after the discovery of the drugs. He said 'ubat cina' before the discovery of the drugs, that is, before PW4 opened the tin. I held that the first accused was arrested only after the discovery of the drugs in the biscuit tin. His statement to PW4 was therefore admissible. Although PW4 said that the first accused was not free to go as he liked during the search, that did not mean that he had been arrested. There was no evidence that he had tried to run.

I find that there was evidence that the first accused was the tenant of the premises No 137-O, Jalan Rambutan. He rented the premises from Kong Ming School. The second accused was the wife of the first accused. There was evidence that the first and second accused occupied the premises. There was evidence that the first and second accused occupied the second room on the first floor of the premises as their bedroom. The first and second accused were therefore not only the occupiers of the premises but also the occupiers of the second room on the first floor of the premises. They had the care and management of the premises. The drug was found concealed in a biscuit tin above the ceiling in the second room. I found that the presumptions under s 37(d), (da) and (g) arose. I therefore held that a prima facie case had been made out against both the accused persons.

The two accused persons gave evidence on oath. The defence witnesses were Tan Khoon Jin (DW3) and Tan Lai Boon (DW5). I will first deal with the evidence of PW10 Tan Keng Thye. PW10 was a prosecution witness. After he had given his evidence the learned DPP applied to the court for permission to cross-examine him under s 154 of the Evidence Act on the ground that his evidence differed from his earlier statement to the police. I read the witness's statement to the police and found there were discrepancies. I permitted the prosecution to cross-examine the witness.

The object of the cross-examination under s 154 of the Evidence Act is only to test the veracity of the witness. The grant of the permission to cross-examine is not an adjudication by the court adverse to the veracity of the witness. Whether the testimony of the witness should be rejected in whole or in part depends on the result of the cross-examination.

The witness did not deny the statement he made to the police. He maintained that his evidence in court was the truth. He explained that he said he never entered the room upstairs because he was frightened as something had been recovered there. I found his explanation to be reasonable. I therefore did not wholly reject his evidence.

DW3 Tan Khoon Jin told the court that in July 1983 he was staying with the accused. He occupied the room downstairs. He used to go to the accused's room upstairs. Prior to 5 July 1983, the accused's daughter and son-in-law had been occupying one room upstairs for about one month. When the police came they were not there. They never came back.

Application was made by the learned DPP to impeach his credit. I read the statement to the police and found contradictions. In the statement he said he never went to the upstairs of the house. His explanation was that he was nervous and scared when he saw the accused being handcuffed. He lied to the police because he did not want to have anything to do with the accused. I regarded his explanation to be reasonable. His credit was not impeached.

DW5 Tan Lai Boon was the son of the accused person. He was called by the defence to produce D15, the photograph of his sister and his brother-in-law. During cross-examination, he said his sister and brother-in-law were in the house prior to the arrest of his parents. They did not return after the arrest. The learned DPP applied to impeach his credit because of contradictions between his evidence and the statement to the police. After the statement had been proved, I explained to the witness the various contradictions and asked him to explain. I did not accept his explanation. The matters he was questioned on were simple matters about the times his sister had returned home and about the use of the first room. Although he was only 14 years old at the time he would have had no difficulty understanding and communicating with the investigating officer. His credit was therefore impeached.

The first accused said that on the day in question when he came home at 1.30 pm the police officers were already at his house. He said they told him that they had received information that there were drugs in the house and that they wanted to make a search in the house. He and his wife (the second accused) were asked to follow during the search. Nothing was found on the ground floor and in the first room upstairs. In his room, PW4 asked one person to go up to the ceiling. It was difficult for him to get up to the ceiling. That person went up on the ceiling for five to six minutes. A tin was lowered and was taken by PW4. He said PW4 asked him if the tin belonged to him. He told PW4 he did not know. PW4 did not ask him what was in the tin. He denied he said

'ubat cina' to PW4. He had not seen the tin before and he did not know how it got to be there.

He also told the court that the first room upstairs was occupied by his son-in-law and daughter. They had been staying in the house for two months prior to the date of the arrest. When the police came they were not in the house. They had left the house at about 10 am. They never came back. The first accused also said that the room downstairs was occupied by three students and one working man.

The second accused also denied any knowledge of the tin found on the ceiling. She also said that prior to the date of her arrest the first room had been occupied by her son-in-law and daughter.

The defence was that both the accused persons did not know the existence of the tin containing the drug concealed on the ceiling above the room occupied by them. Their room was accessible to the other occupants of the house. Prior to the arrest the first room had been occupied by the daughter and son-in-law. The first accused did not say 'ubat cina' to PW4.

I do not believe that the first room had been occupied by the daughter and son-in-law for two months prior to the date of the arrest. There was no bed in the room. The first accused did not mention them in the cautioned statement. In the cautioned statement he mentioned the occupation of the various rooms in the house. If the daughter and son-in-law had been occupying the first room for the last two months he would have mentioned it. The accused also said that the daughter and son-in-law left at 10 am to go to the temple. They never came back and the accused did not know their present whereabouts. I also do not believe this. I find that the accused had made up the story purposely to cast a suspicion of guilt on the daughter and the son-in-law. I considered the evidence of PW10, DW3 and DW5 in this respect. I also do not believe them. I find that these three witnesses said that the daughter and son-in-law had been staying there for the previous two months merely to lend support to the evidence of the accused.

The first accused said that it was difficult for Panjinathan to go up to the ceiling. He had to be pushed up. Nobody could have stood on the cupboard to go to the ceiling. There were carvings on the sides. The carvings were soft and if touched would fall. But PW9, the investigating officer, said she stood on the cupboard. She was not questioned about it. PW8, the photographer, went up to the ceilng to take photographs. He was not questioned. I accept the evidence of PW9. I accept the evidence of PW4 that Panjinathan was standing on the cupboard when he lowered the tin and that he was there for hardly a minute.

The first accused denied that he said 'ubat cina' to PW4. He denied that he was asked what was in the tin. He was asked only if the tin belonged to him to which he replied, 'No, I don't know.' I do not find any reason why PW4 would have testified that the first accused had said 'ubat cina' to him if in fact he had not said so. I believed PW4. I find that the first accused had voluntarily told PW4 that the tin contained 'ubat cina'. I also find that at that time the first accused had not yet been arrested. Therefore, the statement is admissible. This shows that the first accused knew of the existence of the tin.

I did also consider the fact that the first accused had made a cautioned statement and that the statement is not inconsistent to his evidence in court. Having considered all the evidence adduced I have no doubt in my mind that the first accused knew of the existence of the tin containing the drugs concealed on the ceiling of the room occupied by him. I find that it is highly improbable that the drugs had been placed there by other people. PW10, DW3 and DW5 who said that they used to go to the accused's room denied that the drugs were theirs. It is also highly improbable that the drugs had been placed by the daughter and the son-in-law or any other person. I find that on the balance of probabilities the first accused had failed to cast any doubt either as to the truth of the prosecution case or as to his guilt. I therefore found him guilty and convicted him.

As regards the second accused, I had a doubt in my mind as to her knowledge of the existence of the tin. I therefore acquitted and discharged her.

*Order accordingly.*

Solicitors: *Presgrave & Matthews.*

Reported by *Ng Sheau Jiuan*